# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1965**

## No. 256

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UNITED STATES OF AMERICA,

*Appellant,*

*v.*

JOHN W. COOK.

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

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## BRIEF FOR APPELLEE, JOHN W. COOK

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### Question Presented

Whether 18 U.S.C. 660, prohibiting certain embezzlements by employees of "any firm, association, or corporation engaged in commerce as a common carrier," applies to the conduct of an employee of an individual engaged as a common carrier.

### Statute Involved

18 U.S.C. 660 provides, in pertinent part:

> Whoever, being a president, director, officer or manager of any firm, association, or corporation engaged in commerce as a common carrier, or whoever, being

an employee of such common carrier riding in or upon any railroad car, motortruck, steamboat, vessel, aircraft or other vehicle of such carrier moving in interstate commerce, embezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets of such firm, association, or corporation arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

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**Statement**

The statement of the proceedings in the United States District Court for the Middle District of Tennessee is accurately stated in the brief for the United States at pages 2 and 3.

## ARGUMENT

### Introduction and Summary

In combining 18 U.S.C. 412 and 18 U.S.C. 409 (a)(5) to form Section 660 of the Criminal Code of 1948 Congress deleted the phrase "any carrier" from the employee-embezzlement provision of Section 409 (a)(5). Thus the new Section 660 applied to embezzlement by an employee of any "firm, association, or corporation." Prior to the enactment of Section 660 it was manifest that Congress intended to include individuals engaged as common carriers within the protection of federal law. This clarity of

purpose no longer exists under Section 660. In order to hold that individual carriers are within the scope of the statute it is necessary to conclude that Congress considered the word "firm" as the equivalent of "individual". The legislative history of Section 660 clearly negates the proposition that Congress ever considered the word "firm" to be synonymous with, or the equivalent of, "individual". It is only by a strained and artificial construction of the plain words of the Section 660, that employee embezzlements from individual carriers can be held within its scope.

## I.

**Prior to the Enactment of 18 U.S.C. 660 Embezzlements by Employees of Individuals Engaged as Common Carriers Clearly Constituted an Offense Against the United States Under 18 U.S.C. 409 (a)(5).**

It is clear that 18 U.S.C. 660 is basically derived from a combination of Section 412 of the Criminal Code (18 U.S.C. 412 (1946 ed.)) and Section 409 (a)(5) (18 U.S.C. 409 (1946 ed.)), Section 412, the executive-embezzlement provision, was directed toward named executives of any "firm, association, or corporation." Section 409 (a)(5), on the other hand, was aimed at embezzlement by an employee "of any carrier."[1] We do not dispute that the phrase "any carrier", contained in Section 409 (a)(5), was broad enough to include employee embezzlement from an individual engaged as a common carrier. Appellant suggests that the specific inclusion in Section 409 (a)(5) of the offense now under consideration is indicative of legislative intent to

[1] The pertinent context of Section 412 and Section 409(a)(5) is fully set out in the brief for the United States at pp. 5-6, 8.

continue to afford protection to the individual carrier under Section 660. This argument cuts both ways. Prior to the enactment of 18 U.S.C. 660 it was perfectly clear that individually owned carriers were among the entities protected by Section 409 (a)(5). It is self-evident, however, that subsequent to the enactment of Section 660 employee-embezzlements from individuals engaged as common carriers are no longer indictable offenses with any degree of clarity, because the words "any carrier" were deleted from the statute.

## II.

**The Phrase "Any Carrier" Was Specifically Deleted From Section 409 (a)(5) When Congress Merged the Section to Form Section 660 Thereby Specifically Excluding Employee Embezzlements From Individuals Engaged as Common Carriers.**

a. Before probing the question of what Congress intended to do, it is appropriate to examine what Congress in fact did with respect to Section 660. The executive-embezzlement provision of Section 412 of the 1946 Code utilized the appropriate language, "firm, association or corporation" to designate the entities protected. It would not have been appropriate to include individually owned carriers among these entities because the executive of the individual carrier would normally be the owner. The employee-embezzlement provision of Section 409 applied broader terms so as to include embezzlement from "any carrier." When Congress revised the Criminal Code in 1948 it did more than to simply merge Section 412 and Section 409 (a)(5). In drafting Section 660, Congress specifically eliminated the phrase "any carrier", which had been con-

tained in Section 409 (a)(5), and substituted the language "such common" carrier, referring to any "firm, association, or corporation" engaged as a common carrier. It can be fairly and reasonably inferred, on this basis alone, that Congress intended to eliminate employee embezzlements from individual carriers from the scope of Section 660. In *Schmokey* v. *United States*, 182 F.2d 937, the Court of Appeals for the Tenth Circuit, after noting the derivation of Section 660 and after recognizing that individually owned carriers had been protected by Section 409 (a)(5), stated:

> (B)y the plain language of § 660 supra, 'employee' is limited to employees of a firm, association, or corporation. 182 F.2d at 937.

The *Schmokey* case appears to be the only decision on the issue presented and the Court determined the question squarely against Appellant's contentions.

b. It is suggested by Appellant that Congress understood the two phrases, "any carrier . . . in . . . commerce" and "any firm, association, or corporation engaged in commerce as a common carrier" as equivalents; that it evidently found the latter phrase "stylistically more suitable" for use in Section 660. More particularly, Appellant urges that the word "firm" includes an "individual" engaged in commerce as a common carrier. There is nothing in the legislative history of Section 660 to suggest that Congress ever considered "firm" as synonymous with or the equivalent of, an individually owned carrier. On the contrary, prior to the enactment of Section 409 (a)(5), the larceny provision covered larceny of property in commerce from "any person, firm, association, or corporation," 43 Stat. 793, thus clearly recognizing a distinction between larceny from a

"person" (or individual) and a "firm". Senator McCarren's bill, introduced in March, 1945 (S. 739, 79th Cong., 1st Sess.), would have resulted basically in a combination of what later became Section 412 and Section 409 (a)(5) of the Criminal Code of 1946. Senator McCarren proposed to make it an offense to embezzle funds arising or accruing from interstate commerce when committed by a "director, officer, or employee of any person, firm, association, or corporation engaged in commerce as a carrier. . . ." Again, S. 739 clearly recognized the distinction between "person" (or individual) and the word "firm". As we have indicated, S. 739 would have included executive-embezzlements as well as employee-embezzlements; it was, therefore, appropriate to include the word "person" in order to encompass employee embezzlements from individual carriers. In 1946 the Congress enacted the executive and employee embezzlement provisions as two distinct sections of the Criminal Code, i.e., Section 412 and Section 409 (a)(5). In so doing, distinct terminology was used to described the entities protected. The executive-embezzlement provision, quite appropriately for the reason stated previously, specified embezzlement from any "firm, association, or corporation." The employee provision adopted the broader language, "any carrier" to include embezzlement from a person or individual engaged as a common carrier. The distinct language used in Sections 412 and 409 (a)(5) of the 1946 Code is indicative of the fact that Congress recognized that broader terminology was necessary to include individual carriers under Section 409 (a)(5); and, again emphasizes that Congress did not consider the two phrases as synonymous or equivalent. Certainly, it must be conceded that the phrase "any carrier . . . in . . . commerce" is the broader,

more inclusive, terminology. It is difficult to understand why Congress did not use this comprehensive language if it intended to continue to afford federal protection to "any" common carrier. We do not believe the question is answered upon the assumption that "any firm, etc." was stylistically more suitable for use throughout Section 660. While the Revisor's Note accompanying Section 660 is not very illuminating, it is conceded that, in general, the 1948 revision of the Criminal Code was not a revision of substance. The preface to Title 18 U.S.C.A., Vol. 1, pp. V, VI does recognize, however, that there are exceptions.[2]

Admittedly, Section 660, as construed by the Court below and the Tenth Circuit Court of Appeals in *Schmokey* v. *United States, supra,* constitutes a substantive change in the law. But we find it difficult to characterize the modification of Section 660 as being of major substantive significance. There appear to have been only two indictments returned against employees of individual carriers since the 1948 revision. We may merely speculate that either state embezzlement laws have been adequate to cope with the situation or that the United States Attorneys for the several Districts have not considered such offenses indictable under the plain language of Section 660 and/or have concurred with the conclusion reached in the *Schmokey* case. Moreover, Congress has not seen fit to overrule *Schmokey*

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[2] *Honea* v. *United States,* 344 F. 2d 798 (C.A. 5), while holding that the deletion of the words "with intent to defraud the United States or any person" from 18 U.S.C. 912 did not effect a substantive change in the law, did recognize that there are exceptions to the general rule that the 1948 revision was not intended to effect substantive changes. Further, in the *Honea* case, the Revisor's note specifically stated that the quoted language was omitted in view of the Court's decision in *United States* v. *Lapowich,* 318 U.S. 702.

v. *United States* by legislative action although over fifteen years have elapsed since the court's decision. It is not suggested that the failure of Congress to take affirmative action necessarily evidences conclusive legislative approval of the judicial interpretation of Section 660; however, such inaction points in that direction and tends to deflate Appellant's suggestion of the enormity of the problem in regard to individual carriers.

c. Appellant urges that it would be unreasonable to conclude that Congress intended to afford immunity to employees of individually owned carriers while punishing precisely the same conduct when committed by employees of carriers operating under a different form of ownership.[3] It is questionable whether Congress need have any reason to exclude employee embezzlements from individual carriers under Section 660. Regardless of the motives and reasonableness of Congressional action, Appellant's con-

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[3] We do not find it wholly unreasonable to attribute to Congress the intention to exclude individual carriers from the scope of Section 660. It can be reasonably presumed that the great majority of employees of individually owned carriers are over the road truck drivers as distinguished from employees engaged in clerical positions normally employed by partnerships or corporations. The former type of employee is not ordinarily in a position to embezzle substantial sums nor is he in a position to conceal such embezzlements for any appreciable length of time. It is to be noted that the Department of Justice opposed the legislation in question from the beginning upon the ground that it would bring into Federal courts minor embezzlements of a local nature which were better left to state action. See Brief for the United States pp. 8-10 N. 5. The instant case represents a perfect example in that we are here dealing with the alleged embezzlement by a truck driver of $200.00 accruing from an interstate shipment of bananas (R. 1). We find it no less reasonable to speculate that Congress intended to eliminate at least a portion of these minor offenses than to presume that Congress deleted the phrase "any carrier" in drafting Section 660 for the sake of style.

tention is based primarily upon a consideration of the mischief which the legislature sought to remedy and not upon what Congress in fact did when it eliminated the phrase "any carrier" from Section 409 (a)(5) in merging the section into the new Section 660. The Court of Appeals for the Fourth Circuit in *Ventimiglia* v. *United States,* 242 F.2d 620, appropriately answers Appellant's contention:

> A criminal statute is not to be stretched to cases not covered merely because it may seem to a court that Congress would have done well to cover them. Even when the court may feel that if the omission had been called to the attention of Congress, it might have written the statute differently to cover the omitted case, the Court is not empowered to exercise the task of revision. 242 F.2d at 623.

It is well established that where the language of the statute itself does not plainly include the offense in question, it is not within the province of the Court to make it so simply "because it is of equal atrocity or of kindred character with those which are enumerated. . . ." *Bouie* v. *City of Columbia,* 378 U.S. 347 (quoting Marshall, C.J., 5 Wheat. 76, 96).

## III.

**A Fair Reading of Section 660 in Accord With the Ordinary Usage of the Language Employed by Congress Requires the Exclusion of Individuals Engaged as Carriers From the Protection of the Statute.**

a. The rule that penal laws are to be strictly construed is too well established to require citation to authority. This rule of strict construction is founded upon the high regard of the law for the rights of individuals and upon the principle that the power of punishment is vested in the legislative and not the judicial department.[4] We recognize, however, that the mere recitation of rules of statutory construction does not resolve the issue in this case. Strict construction does not require the Court to disregard common sense and manifested statutory purpose and it is sufficient if the words are given their fair meaning in accordance with their ordinary usage and general acceptance. But it is respectfully insisted that the word "firm" cannot fairly be read to include individual carriers engaged in commerce, and it is submitted that by the plain language of 18 U.S.C. 660, embezzlement by an employee of an individual engaged in commerce is not included as a Federal offense.[5] As we have shown, Congress has consistently considered the language "any firm" and "any person" (or individual) as distinct. While the United States contends that "firm" can naturally be read in context to include an individual engaged as a common carrier,[6] we have been

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[4] *United States* v. *Wiltberger*, 5 Wheat. 76.

[5] *Schmokey* v. *United States*, 182 F. 2d 937.

[6] *United States* v. *Alpers*, 338 U.S. 680, cited at p. 15 N. 9 of appellant's brief, is not difficult to reconcile with the principle that

unable to find any case from any jurisdiction which has ever held the word "firm" to be synonymous with or the equivalent of the term "individual". On the contrary, every case found which has considered the import of the word "firm" has held the term to be synonymous with "partnership".[7] The word "firm", according to its ordinary usage

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the statutory words are to be given their fair meaning when it is noted that in addition to the enumerated obscene materials prohibited, e.g., books, pictures, etc., the statute went further to prohibit interstate shipment of "other matter of indecent character". The Court held that the latter phrase was broad enough to fairly include interstate shipment of obscene phonograph records. The *Alpers* case is not comparable to appellant's contention in the instant case, i.e., that "firm" is so comprehensive as to be the equivalent of "individual". *United States* v. *A & P Trucking Co.*, 358 U.S. 121, cited by appellant at p. 15 N. 9, is readily distinguishable. Here a partnership was charged with violation of 18 U.S.C. 835, imposing criminal penalties upon "whoever" knowingly violated Interstate Commerce Commission regulations pertaining to interstate transportation of explosives. The Court held that 1 U.S.C. 1, which provided that in determining the meaning of any act of Congress the word "whoever" includes "partnerships", was applicable to 18 U.S.C. 835 and, therefore, concluded that partnerships were within the scope of the statute. Unlike the *A & P Trucking Co.* case there are no statutory rules of construction to lead the Court to the conclusion that "firm" is to be construed as the equivalent of "individual". The Court's holding in *United States* v. *Shirey*, 359 U.S. 255, that the Republican party is a "person" within the meaning of 18 U.S.C. 214 is not comparable to the instant case. This construction is in accord with the fair implication of the term "person" since the Republican party is composed of persons. It is not difficult to find cases construing the word "person" to include a group of individuals, e.g., *United States* v. *A & P Trucking Co.*, *supra;* but the converse is not true. Neither do we find it difficult to accept that the term "department", as used in 18 U.S.C. 1001, can naturally and fairly be read to include the legislative and judicial branches of the government.

[7] E.g., *Thomas-Bonner Co.* v. *Hooven*, 284 F. 377, 380 ("The word 'firm' is synonymous with 'partnership' "); *Gustafson* v. *Taber*, 125 Mont. 225, 234 P.2d 471, 475 ("The word (firm) is used as synonymous with partnerships."); *McMillen* v. *Industrial Comm'n*, 13 Ohio App. 310 specifically holds that "firm", used in its ordinary sense, designates a partnership and not a "person" or corporation.

is synonymous with and the equivalent of "partnership".[8] It is only by a strained and artificial construction that "firm" can be held the equivalent of "individual".[9]

b. Conflicting inferences may be drawn from the legislative history of 18 U.S.C. 660 and differing conclusions may be reached with respect to the actions of Congress in regard to the employee embezzlement provision. In this situation it is submitted that the Court's statement in *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218 is fully applicable:

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[8] *Webster's Third New International Dictionary—Unabridged* (1961 ed.) p. 856, defines "firm" as "a partnership of two or more persons not recognized as a legal person distinct from the members composing it,". The United States points out that *Webster's* also defines "firm" as "the name, title or style under which a company transacts business:", but that same authority defines "company" as "An *association of persons* for carrying on a commercial enterprise or business (as a partnership or stock company)." *Webster's Third New International Dictionary—Unabridged* (1961 ed.).

[9] Compare *United States* v. *Harris*, 177 U.S. 305, holding that receivers, appointed to manage and control the Philadelphia and Reading Railroad were not liable to an action for penalties under U.S. Rev. Stat. Sections 4386-4389 for failure to comply with regulations as to transportation of livestock by "any company, owner, or custodian of such animals." After acknowledging the government's insistence that the courts had to some extent relaxed the rule of strict construction generally applied to penal statutes, the court stated:

> It must be admitted that, in order to hold receivers, they must be regarded as included in the word "company". Only by a strained and artificial construction, based chiefly upon a consideration of the mischief which the legislature sought to remedy, can receivers be brought within the terms of the law . . . It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subject to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute. 177 U.S. at 309.

> Not that penal statutes are not subject to the basic consideration that legislation like all other writings should be given, insofar as the language permits, a commonsensical meaning. But when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication. 344 U.S. at 222.

See, also, *United States* v. *Harris,* 177 U.S. 305; *United States* v. *Shackney,* 333 F.2d 475.

**Conclusion**

The judgment of the district court should be affirmed.

Respectfully submitted,

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